

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JOHN B. ROBBINS, JUDGE

DIVISION III

CACR 05-1243

JANUARY 31, 2007

FRANKLIN DRENNAN and
RICKY DHASUN PEOPLES
APPELLANTS

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT,
FIFTH DIVISION
[NOS. CR03-697, CR03-2829]

V.

HONORABLE WILLARD PROCTOR,
JR., JUDGE

STATE OF ARKANSAS

APPELLEE

AFFIRMED

Appellant Franklin Drennan is the father of appellant Ricky Dhasun Peoples. The appellants were tried together in a jury trial, and each was convicted of attempted first-degree murder of the victim, DeMarco Boyd, based on the State's proof that Mr. Peoples shot Mr. Boyd at his father's direction. Mr. Drennan was sentenced to forty years in prison and Mr. Peoples, who was sixteen years old at the time of the offense, was sentenced to nine years in prison. The appellants have filed separate briefs in this joint appeal.

Mr. Drennan's sole argument on appeal is a challenge to the sufficiency of the evidence to support his conviction. Mr. Peoples also challenges the sufficiency of the evidence, and he raises seven additional arguments for reversal as follows: (1) the identification of appellant by the victim was tainted and should have been suppressed; (2)

the appellant's trial should have been severed from that of his co-defendant; (3) the trial court erred in failing to admit a forensic mental evaluation of the victim; (4) the victim's sister, Nakita Boyd, should not have been permitted to testify to Mr. Peoples being the driver of a car near the crime scene on the night of the shooting; (5) the trial court erred in refusing one of appellant's proposed jury instructions; (6) the transcript of appellant's interview with the police should not have been permitted before the jury; and (7) the trial court should have granted Mr. Peoples' motion for mistrial. We affirm the convictions of both Mr. Drennan and Mr. Peoples.

This court considers challenges to the sufficiency of the evidence prior to any other alleged trial errors. *Weston v. State*, __ Ark. __, __ S.W.3d __ (May 4, 2006). In considering a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the State, considering only that evidence that supports the verdict. *Walley v. State*, 353 Ark. 586, 112 S.W.3d 349 (1999). The test is whether there is substantial evidence to support the verdict. *Id.* Substantial evidence is evidence of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or another beyond suspicion or conjecture. *Id.* Circumstantial evidence constitutes substantial evidence when it indicates the accused's guilt and excludes every other reasonable hypothesis. *See Gamble v. State*, 351 Ark. 541, 95 S.W.3d 755 (2003).

Dr. David Bevans testified first for the State. Dr. Bevans testified that he performed surgery on Mr. Boyd on the morning of June 15, 2003. Dr. Bevans observed open wounds

to the victim's right lower abdomen, buttocks, and left hip. Dr. Bevens also found an apparent bullet fragment in Mr. Boyd's abdomen. According to Dr. Bevens, the injuries he treated were consistent with gunshot wounds. Dr. Bevens gave the opinion that, but for medical intervention for the injuries, Mr. Boyd would have died.

The victim's sister, Nakita Boyd, testified next. She stated that in June 2003 her brother lived with their mother in Little Rock, and that she lived in a house about a block away. Ms. Boyd testified that, about a week before the shooting, she was sitting on her porch when Mr. Drennan stopped his car in front of her house. She then approached Mr. Drennan in his car. At that time Mr. Drennan, who is confined to a wheelchair, advised Ms. Boyd that Mr. Boyd had pushed him out of his wheelchair, causing him injuries. According to Ms. Boyd, Mr. Drennan stated, "I'm going to kill your brother. My sons have already been over to your mom's house looking for him, and I told them not to come to your house because you don't have anything to do with it." Ms. Boyd testified that she did not relate this threat to the police until the morning after Mr. Boyd had been shot.

Ms. Boyd testified that she and a friend were at a night club in the early morning hours of June 15, 2003, when she received a call that her brother had been shot. Ms. Boyd's friend drove her to where the shooting occurred, which was in her neighborhood. Ms. Boyd stated that while on the way to the crime scene she noticed the white car that Mr. Drennan had been driving a week earlier. The car was proceeding down the road with its headlights off, and Ms. Boyd testified that Mr. Peoples was the driver. Ms. Boyd stated that the white

car parked in the vicinity of the crime scene, and that Mr. Drennan was also nearby in his wheelchair. Ms. Boyd's friend corroborated the fact that there was a white car and a man in a wheelchair near the crime scene that night.

Percy Perry, Jr., lives in the neighborhood where the shooting occurred, and testified that he was awakened by four or five gunshots. Shortly thereafter, Mr. Boyd arrived at Mr. Perry's house, fell onto the porch, and asked Mr. Perry to call the police because he had been shot.

The victim's mother, Joyce Ann Humphrey, testified that Mr. Boyd left her residence on June 14, 2003, at almost midnight. She stated that he intended to walk to a friend's house about three blocks away, and from there go to a night club. Soon thereafter, Ms. Humphrey heard gunshots. She called Mr. Boyd's friend and asked him to check the neighborhood, and after doing so the friend called back and advised Ms. Humphrey that her son had been shot. Ms. Humphrey testified that sometime prior to the shooting, her daughter told her about Mr. Drennan's threat to kill Mr. Boyd.

On cross-examination, Ms. Humphrey acknowledged that Mr. Boyd has had problems with his memory in the past, particularly when he was drinking. Ms. Humphrey also acknowledged erratic behavior by Mr. Boyd, including a previous occasion when he was apparently on drugs and set fire to their house. However, Ms. Humphrey stated that on the night of the shooting, "it seemed like he wasn't drinking" according to her observations.

Mr. Boyd testified that, on the night of the shooting, he was walking to his friend's house when he was confronted on the street by Mr. Drennan and Mr. Peoples. As Mr. Boyd approached, Mr. Drennan stated, "I told you I was going to kill you." Mr. Boyd then stated to Mr. Drennan, "If I did anything to you, I apologize," and asked Mr. Drennan if he was going to shoot him. According to Mr. Boyd, Mr. Drennan replied, "No, I am not going to shoot your bitch ass, my son is." Mr. Drennan then reached under his wheelchair, produced what appeared to be a 9-millimeter handgun, and gave it to Mr. Peoples. Seconds later, Mr. Peoples shot twice into Mr. Boyd's stomach. After Mr. Boyd turned and started walking to a neighbor's house, he was shot again in the back. He subsequently saw a white car leaving the area. Mr. Boyd testified that he is "100 percent certain" that Mr. Drennan and Mr. Peoples were the two men that confronted him that night.

Mr. Boyd stated that he had never had a problem with Mr. Peoples prior to the shooting, but that he had been in an argument with Mr. Drennan on a prior recent occasion. The argument arose from Mr. Boyd's dissatisfaction with the fact that Mr. Boyd's stepfather had sold a car to Mr. Drennan while Mr. Boyd was in jail. The car had been used in the past by Mr. Boyd, and he was upset with Mr. Drennan and wanted the car back. On a subsequent occasion, Mr. Boyd called the police because he had gone to Mr. Drennan's house to apologize about the argument, and Mr. Drennan pulled what looked like a 9-millimeter handgun and threatened him, stating, "I am tired of you and I should kill you right now."

On cross-examination, Mr. Boyd denied ever having memory problems or telling anyone that he had memory problems. However, Mr. Boyd then acknowledged a prior forensic medical evaluation wherein he told Dr. Michael Simon that he had trouble remembering “just about everything.” Mr. Boyd testified that he has trouble with his memory “from time to time.”

Officer Edward Moring testified that he investigated the scene of the shooting. He stated that he was aware of the prior complaints by Mr. Boyd against Mr. Drennan, and that Mr. Drennan lived less than a half a block from the crime scene. Officer Mickey Holloway also assisted in the investigation, and he recovered eight 9-millimeter spent casings from the scene that were all matching.

Officer J.C. White investigated the shooting, and made contact with Mr. Boyd at the hospital on the day after it occurred. Officer White showed Mr. Boyd a photospread and Mr. Boyd identified Mr. Drennan as the man who told his son to kill him. Mr. Boyd was shown two additional lineups that contained neither of the appellants, and he identified another of Mr. Drennan’s sons from one of those lineups and advised the police that he was not involved in the shooting. Mr. Boyd indicated to the police that the other person involved in the shooting was Mr. Peoples, and a few days later Officer White showed Mr. Boyd a page from a school yearbook containing Mr. Peoples’ photograph. From that page, Mr. Boyd immediately circled Mr. Peoples’ photograph and identified him as the shooter.

While Mr. Drennan was arrested on June 19, 2003, Mr. Peoples was not taken into custody until March 18, 2004. At that time, Officer White *Mirandized* Mr. Peoples and conducted a taped interview. After being advised of the allegations against him, Mr. Peoples stated that he knew nothing about the shooting and was visiting his grandmother in Oklahoma City when it occurred. Over objection, Officer White was permitted to use a transcription of the taped interview to further testify about their conversation. Officer White testified that he told Mr. Peoples that the police had been trying to locate him since June 19, 2003. During the interview, Mr. Peoples acknowledged that his mother had notified him of the allegations against him, but he chose not to turn himself in because he needed to take care of younger siblings. Officer White testified that throughout the entire interview, Mr. Peoples denied participating in the shooting or even being in Little Rock on that night.

Kenya Holmes testified on behalf of the defense. She stated that Mr. Drennan lived with her at the time of the shooting and that she was inside her house when she heard the shots. Ms. Holmes maintained that at that time Mr. Drennan was outside working on a car, and that she went to check on him to make sure he was alright and he responded that he was. According to Ms. Holmes, Mr. Peoples was not at her house that night.

Mr. Peoples' aunt testified on his behalf and indicated that he does not communicate well and is easily confused. Mr. Peoples' mother corroborated that fact in her testimony. Mr. Peoples' mother further testified that her son had left for Oklahoma City on June 5, 2003, and was still there when the shooting took place. She stated that when the police

contacted her in late June or early July 2003, she told the police that Mr. Peoples was in Oklahoma City and then called her son advising him of the allegations.

We first address Mr. Drennan's argument that substantial evidence does not support his conviction for attempted first-degree murder. Pursuant to Ark. Code Ann. § 5-3-201(a)(2) (Repl. 2006), a person attempts to commit an offense if he or she purposely engages in conduct that constitutes a substantial step in a course of conduct intended to culminate in the commission of an offense whether or not the attendant circumstances are as the person believes them to be. A person commits murder in the first degree if, with the purpose of causing the death of another person, the person causes the death of another person. Ark. Code Ann. § 5-10-102(a)(2) (Repl. 2006). A person acts purposely with respect to his conduct when it is the person's conscious object to engage in conduct of that nature or to cause the result. Ark. Code Ann. § 5-2-202(1) (Repl. 2006).

In this case Mr. Drennan argues that there was no substantial evidence that he had the requisite culpable mental state to cause the victim's death. He acknowledges that the State proved that Mr. Boyd sustained gunshot wounds to his right lower abdomen, buttocks, and left hip. While these wounds were serious, Mr. Drennan contends that they were not sufficiently serious to permit the jury to infer that, at the moment Mr. Boyd sustained the wounds, it was Mr. Drennan's conscious object that Mr. Boyd would die as a result of the wounds. Mr. Drennan submits that such an inference could only have been reached if the

wounds were to the head or upper abdomen. Mr. Drennan argues that under these circumstances he did not take a substantial step toward causing Mr. Boyd's death.

Intent or state of mind is rarely capable of proof by direct evidence and must usually be inferred from the circumstances of the crime. *Price v. State*, 347 Ark. 708, 66 S.W.3d 653 (2002). Intent may also be inferred from the type of weapon used, the manner of its use, and the nature, extent, and location of the wounds. *Coggin v. State*, 356 Ark. 424, 156 S.W.3d 712 (2004). From the circumstances presented in this case, there was substantial evidence to support the jury's conclusion that it was Mr. Drennan's purpose to cause Mr. Boyd's death.

The evidence viewed in the light most favorable to the State was as follows. Mr. Drennan and Mr. Boyd got into an argument about the sale of an automobile. When Mr. Boyd tried to apologize the next day, Mr. Drennan pulled a gun and issued a death threat. Mr. Drennan also told Mr. Boyd's sister that he was going to kill him. On the night of the shooting, Mr. Drennan stated, "I told you I was going to kill you," further advised Mr. Boyd that his son was going to shoot him, and handed his son a gun. Mr. Boyd's son then proceeded to fire eight shots from the semi-automatic weapon, with three of them striking Mr. Boyd in his midsection. According to the emergency surgeon, Mr. Boyd would have died without treatment. Four holes in Mr. Boyd's small intestine were repaired, requiring removal of a segment of the intestine, and he wore a colostomy bag for four months. The State correctly asserts that Mr. Drennan cannot rely on the intervention of others to insulate

him from the consequences of his actions. From these facts we have no hesitation in holding that substantial evidence supports Mr. Drennan's conviction for attempted first-degree murder.

We now turn to Mr. Peoples' appeal, and we first address his challenge to the sufficiency of the evidence. Mr. Peoples' argument in this regard is similar to that posited by Mr. Drennan. He argues that there was not substantial evidence that the shooter intended to kill Mr. Boyd because he shot from a few feet away and did not shoot Mr. Boyd in the heart or the head at point blank range. Mr. Peoples notes that Dr. Bevans testified that the most efficient way to kill someone by gunshot would be to shoot him in the aorta or the head.

Although it may be that the conduct of Mr. Peoples was not the most efficient way to cause Mr. Boyd's death, we nonetheless hold that there was substantial evidence of Mr. Peoples' purpose to do so where he fired multiple shots and struck Mr. Boyd three times, causing intraabdominal damage, after the immediate death threat made by his father toward Mr. Boyd. While Mr. Peoples asserts that Mr. Boyd "only had...intraabdominal damage as a result of the incident," there was evidence that such damage was capable of causing Mr. Boyd's death and would have done so but for the emergency medical treatment. Under such circumstances, there was sufficient evidence to support Mr. Peoples' conviction for first-degree attempted murder.

We next address Mr. Peoples' argument that his pretrial identification by Mr. Boyd was tainted, and that the in-court identification by Mr. Boyd should have been suppressed. Mr. Peoples cites *Fields v. State*, 349 Ark. 122, 76 S.W.3d 868 (2002), where the supreme court held that a pretrial identification violates the Due Process Clause when there are suggestive elements in the identification procedure that makes it all but inevitable that the victim will identify one person as the culprit. Mr. Peoples submits that identification procedure used in this case was unduly suggestive where Mr. Boyd selected him from a yearbook with names printed on it. Mr. Peoples further contends that the pretrial identification was tainted because Mr. Boyd had been administered drugs affecting his mental faculties, including morphine. Finally, Mr. Peoples asserts that his identification should have been suppressed because Mr. Boyd generally lacks credibility, and because Mr. Boyd had an opportunity to view him on two occasions between the time of the shooting and the pretrial hearing on his motion to suppress.

The appellate court will not reverse a trial court's ruling on the admissibility of an in-court identification unless the ruling is clearly erroneous under the totality of the circumstances. *Travis v. State*, 328 Ark. 442, 944 S.W.2d 96 (1997). In making that determination, the reviewing court looks first at whether the pretrial identification procedure was unnecessarily suggestive or otherwise constitutionally suspect, and it is the appellant's burden to show that the pretrial identification procedure was suspect. *Mills v. State*, 322 Ark. 647, 910 S.W.2d 682 (1995). The linchpin in determining the admissibility of

identification testimony is reliability. *Id.* The appellate court does not inject itself into the process of determining reliability unless there is a very substantial likelihood of irreparable misidentification. *Id.* Even when the identification procedure is impermissibly suggestive, testimony concerning the identification is admissible if the credibility of identification is reliable. *Id.* In determining reliability, the following factors are considered: (1) the prior opportunity of the witness to observe the alleged act; (2) the accuracy of the prior description of the accused; (3) any identification of another person prior to the pretrial identification procedure; (4) the level of certainty demonstrated at the confrontation; (5) the failure of the witness to identify the defendant on a prior occasion; and (6) the lapse of time between the alleged act and the pretrial identification procedure. *Kimble v. State*, 331 Ark. 155, 959 S.W.2d 43 (1998).

We hold that the trial court did not clearly err in admitting the in-court identification of Mr. Peoples because the pretrial identification procedure was not unduly suggestive, and moreover the reliability of the identification was sufficiently established. While Mr. Boyd did testify that the names of the students were on the yearbook page, Officer White testified to the contrary and the exhibit introduced into evidence shows that the names were almost completely blanked out. The yearbook page consisted of more than forty students.

The reliability of Mr. Boyd's identification of Mr. Peoples as the shooter was established by multiple factors. Significantly, Mr. Boyd testified at the pretrial hearing that he knew Mr. Peoples from around the neighborhood before the shooting, and had engaged

in brief conversations with him. When he was shown two photo lineups that did not include Mr. Peoples' photo, he declined to identify anyone as the shooter, but instead selected Mr. Peoples' brother and told Officer White that he was not involved in the shooting. Officer White testified that Mr. Boyd was coherent and responsive, and when shown the yearbook page just four days after the shooting Mr. Boyd immediately identified Mr. Peoples. Mr. Boyd testified that he was under a streetlight when the shooting occurred, that Mr. Peoples was just a few feet away, and that he was "100 percent sure of who shot me." Considering these factors, there was no error in the trial court's decision to permit the identification evidence.

Mr. Peoples' next argument is that the trial court erred in failing to grant his motion to sever the trial from his co-defendant. The trial court shall grant a severance if it is deemed appropriate to promote a fair determination of the guilt or innocence of one or more defendants. *See* Ark. R. Crim. P. 22.3(b)(i). In *McDaniel v. State*, 278 Ark. 631, 648 S.W.2d 57 (1983), our supreme court stated that the following factors favor severance:

- (1) where the defenses are antagonistic;
- (2) where it is difficult to segregate the evidence;
- (3) where there is a lack of substantial evidence implicating one defendant except for the accusation of the other defendant;
- (4) where one defendant could have deprived the other of all peremptory challenges;
- (5) where if one defendant chooses to testify the other is compelled to do so;
- (6) where one defendant has no prior criminal record and the other has;
- (7) where circumstantial evidence against one defendant appears stronger than against the other.

Id. at 638, 648 S.W.2d at 60. We will not disturb a trial court's ruling to grant or deny a severance absent an abuse of discretion. *Echols v. State*, 326 Ark. 917, 936 S.W.2d 509 (1996).

Mr. Peoples argues that because his relationship with Mr. Boyd was minimal, while Mr. Boyd and Mr. Drennan had an ongoing feud, the jury had difficulty segregating the evidence. He further submits that the circumstantial evidence against Mr. Drennan was stronger than that against him. Mr. Peoples also notes that Mr. Drennan had a long list of prior felony convictions. Finally, Mr. Peoples asserts that Mr. Drennan could have deprived him of his peremptory strikes during jury voir dire. For all of these reasons, Mr. Peoples argues that the trial should have been severed.

We hold that there was no abuse of discretion in refusing to sever the trials. Contrary to Mr. Peoples' position, the factors announced in *McDaniel v. State, supra*, are largely inapplicable to this case. Neither of the appellants' defenses were antagonistic as they both defended on the basis that they were not present when the shooting occurred. Moreover, neither appellant testified or attempted to implicate the other as the culprit. While there was more circumstantial evidence against Mr. Drennan, it is not evident that it was difficult for the jury to segregate the evidence. While Mr. Drennan was tried as a habitual offender, his prior criminal record was not disclosed to the jury during the guilt phase of the trial. And while there was the potential for Mr. Peoples to be deprived of peremptory strikes, as in other cases where defendants are tried together, it is not apparent that any such deprivation

or prejudice occurred. The issue of severance is to be determined on a case-by-case basis, considering the totality of the circumstances. *Herron v. State*, 362 Ark. 446, __ S.W.3d __ (2005). Under the totality of the circumstances in this case, the trial court committed no error by deciding not to sever.

Mr. Peoples next argues that the trial court erred in not allowing him to introduce a July 2002 forensic mental examination of Mr. Boyd performed by Dr. Simon in a previous criminal matter, which was performed to determine whether Mr. Boyd was competent to stand trial and appreciate the criminality of his conduct. The evaluation states that Mr. Boyd attempted to burn down his house while locked in one of the bedrooms. In the report, Dr. Simon stated that Mr. Boyd claimed to have no memory of the alleged offense. Dr. Simon further reported that Mr. Boyd stressed that he had a memory problem and that Mr. Boyd stated, “I have trouble remembering just about everything.” Mr. Peoples argues that he should have been allowed to introduce the report to impeach Mr. Boyd’s credibility. He relies on *Rock v. State*, 288 Ark. 566, 708 S.W.2d 78 (1986), where the supreme court recognized the defendant’s right to cross-examine a witness as to his memory for impeachment purposes.

We hold that the trial court committed no error in refusing to admit the forensic evaluation because it was a medical record containing communications made for the purpose of diagnosing his mental condition in an unrelated case, and thus was inadmissible under Ark. R. Evid. 503. Moreover, Mr. Peoples suffered no prejudice by the trial court’s decision

because he was able to admit evidence of Mr. Boyd's alleged memory problems through other means. In this regard, Mr. Boyd's mother testified that Mr. Boyd had trouble with his memory. And on cross-examination, Mr. Boyd acknowledged the mental evaluation and admitted stating to Dr. Simon, "I have trouble remembering just about everything." He further testified that he has trouble with his memory from time to time. For these reasons, any error in this regard would have been harmless.

Although not listed as one of Mr. Peoples' points on appeal, his brief also raises the related argument that he should have been able to cross-examine Mr. Boyd and Dr. Simon concerning Dr. Simon's suggestion in the forensic report that Mr. Boyd was feigning memory impairment. However, this argument is without merit because, as stated previously, the report was inadmissible.

Mr. Peoples next contends that the victim's sister, Nikita Boyd, should not have been allowed to identify him as the driver of the white car in her testimony. Mr. Peoples claims that this testimony violated *Brady v. Maryland*, 373 U.S. 83 (1963), because the State knew of the statement but did not disclose it in discovery, and that this resulted in surprise and prejudice. Mr. Peoples notes that, in her testimony, Ms. Boyd admitted that at the crime scene she gave a statement to the police that Mr. Peoples was driving the car, and also told the police that Mr. Peoples was the man who shot her brother. Mr. Peoples argues that neither of these statements should have been permitted in Ms. Boyd's testimony, specifically

contending that her testimony about the identity of the shooter prejudiced and misled the jury to believe that she was an eyewitness to the shooting.

We hold that the trial court did not abuse its discretion in allowing the disputed testimony of Ms. Boyd. As to identifying Mr. Peoples as the shooter to the police, it is evident from her testimony that she was not claiming to be an eyewitness, but rather identified him as the shooter only because he was driving the white car that she had seen Mr. Drennan driving a week earlier. Thus, the jury was not misled to believe that she witnessed the shooting. Moreover, the argument on appeal regarding that statement to the police was not raised below and is thus not preserved for review. *See Noonan v. State*, 339 Ark. 253, 4 S.W.3d 497 (1999).

As for the alleged *Brady* violation, the State correctly points out that *Brady* pertains to evidence favorable to the defense, and the testimony about Mr. Peoples being the driver of the car was clearly inculpatory. And in *United States v. Agurs*, 427 U.S. 97, 109 (1976), the Supreme Court stated that “there is no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work in a case.” The State made Mr. Peoples aware that Ms. Boyd would be a witness in the case, and there were no written statements taken from Ms. Boyd. In fact, all of the officers who testified could not recall Ms. Boyd telling them that Mr. Peoples was at the crime scene in the white car. Under these circumstances, the trial court did not err in permitting Ms. Boyd’s testimony.

Mr. Peoples next asserts that the trial court erred in failing to give the following proffered jury instruction:

In order to find that Ricky Dhsun [sic] Peoples acted with a premeditations [sic] and deliberated purpose, you must find that he had the conscious object to cause death and that he formed that intention before acting, as a result of a weighing in the mind of the consequences of a course of conduct as distinguishing for acting upon sudden impulse without the exercise of reasoning powers.

It is not necessary that the state of mind existed for any particular length of time, but it is necessary that it was formed before the homicidal act was committed.

This argument is without merit and is easily dispensed with because premeditation and deliberation are not elements of first-degree murder. The proffered instruction was not a correct statement of the applicable law, and was thus properly refused by the trial court. *See Jones v. State*, 336 Ark. 191, 984 S.W.2d 432 (1999).

We next turn to Mr. Peoples' argument that Officer White should not have been permitted to give his interpretations of several inaudible portions of the audio taped interview that had been transcribed. Mr. Peoples argues that the use of the transcription violated the best evidence rule, which states, "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by [rules adopted by the Supreme Court of this state or by] statute." Ark. R. Evid. 1002. Mr. Peoples further alleges a discovery violation because the original tape was not provided to the defense prior to trial.

While the audio tape did constitute the best evidence of the interview, any error concerning the officer reading from the transcript of the tape was harmless. This is because,

during cross-examination of Officer White, Mr. Peoples successfully introduced and admitted the tape into evidence. Therefore, the jury was able to decide for themselves the content of the interview, and Mr. Peoples' request for the best evidence was met. As for his claim that the tape was not provided before trial, we note that in its response to discovery the State set forth its longstanding practice of allowing the defense attorneys to inspect its entire file, and such "open file" policy complies with the discovery rules under Ark. R. Crim. P. 17.2(b)(ii).

Mr. Peoples' remaining argument is that the trial court erred in denying his motion for mistrial. The motion was made during the testimony of Officer White, where Mr. Peoples objected to Officer White's testimony that Mr. Peoples had told him he had gone to Oklahoma City. At that point Mr. Peoples asked for a mistrial, and now contends that it should have been granted because the prejudicial inference before the jury was that Mr. Peoples had fled to Oklahoma City to evade arrest after the shooting.

A mistrial is an extreme remedy which will be resorted to only when there has been an error so prejudicial that justice cannot be served by continuing with the trial or when the fairness of the trial has been manifestly affected. *Armstrong v. State*, __ Ark. App. __, __ S.W.3d __ (Apr. 13, 2006). A trial court has wide discretion in granting or denying a motion for mistrial, and absent an abuse of that discretion, the trial court's decision will not be disturbed on appeal. *Id.* In the present case, we hold that there was no abuse of discretion in failing to grant a mistrial. Significantly, the testimony by Officer White about the

interview was consistent with Mr. Peoples' defense that he could not have been involved in the shooting because he was in Oklahoma City when it occurred. In this regard, Officer White acknowledged that during the entire interview Mr. Peoples denied being around Little Rock on that particular evening. Such was consistent with Mr. Peoples' mother's testimony, where she stated he had left for Oklahoma City in early June 2003. The fairness of the trial was not compromised, and we affirm on this point.

We affirm the convictions of both Mr. Drennan and Mr. Peoples.

GLOVER and MILLER, JJ., agree.